SPENCE & CHAPIN
SERVICE AND CARING SINCE 1908

Comments on
Proposed Regulations Issued by the Department of State
Hague Convention on Intercountry Adoption and the
Intercountry Adoption Act of 2000
Accreditation of Agencies
Approval of Persons
Preservation of Convention Records

Submitted to: U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room SA-29
2201 C Street, NW
Washington, DC 20520

Re: Docket Number State/AR-01/96

Spence-Chapin Services to Families and Children respectfully submits the following comments to the Department of State on the Proposed Regulations to Implement the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (the Convention), and the Intercountry Adoption Act of 2000 (the IAA).

I. Background on Spence-Chapin

Spence-Chapin is a private, not-for-profit adoption agency specifically authorized by the states of New York, New Jersey and Connecticut to place children. Our agency focuses on finding adoptive homes for infants and young children who need families, promoting the understanding of adoption through counseling and public education, and improving adoption's image and practice. We work primarily with residents of New York, New Jersey, and Connecticut and frequently coordinate with other agencies throughout the United States for special needs children and international adoptions. Our services include support services for adoptive families and pregnant women, as well as interim care for infants awaiting adoption. We also provide ongoing support for families with adopted children, adoptees, birth parents, educators, and others involved in adoption through our Adoption Resource Center.

We have a strong and vital international adoption program. We launched our first international program in South Korea in 1975. In over 25 years, we have placed children from Korea, China, Vietnam, India, Russia, Moldova, Kazakhstan, Bulgaria, Cambodia, Colombia, Ecuador, and Guatemala.

Our agency handles 70 to 80 domestic adoptions, and 140 to 170 international adoptions a year. Spence-Chapin maintains accreditation from the Council on Accreditation for Children and Family Services, Inc.

II. General Comments

Spence-Chapin strongly supports the Hague Convention, the IAA, and the important contributions the Department of State has made in implementing these new laws. The goals of the Convention and the IAA are, above all, to ensure that intercountry adoptions take place in the best interests of the child, and that safeguards are in place to prevent the abduction, sale of, or traffic in children. The United States must meet its obligations under the Convention in order to further these vital ends. We recognize that implementation of the Hague Convention and the IAA will require significant changes in the practice of international adoption. We understand that many of these changes, as incorporated into the proposed regulations, will be difficult for agencies and individuals in the U.S. to implement. However, the new adoption practices will result in notable improvements, a higher level of integrity in the adoption process, and better quality and service for children and families in international adoptions.

The State Department's proposed regulations reflect, overall, a comprehensive understanding of international adoptions and the practice of international adoption in the United States. The Department tackled and successfully resolved many difficult issues involved in implementation of the Convention and the IAA. We understand that many practitioners will object to any changes in current practices. We have tried to focus our comments not on what will be difficult to implement – because we recognize that changes are necessary – but on those proposed regulations that we believe would impede the ability of our agency and other agencies to provide adoption services for families and children consistent with the Convention.

Spence-Chapin plans to seek accreditation to provide international adoption services under the Convention. If accredited, our agency would in many cases be likely to serve as the primary provider in Hague intercountry adoptions. Our comments on the proposed regulations reflect our views as a likely primary provider.

The most serious concern that we have with the proposed regulations relates to the liability risks that are imposed on primary provider agencies. We believe that the proposed regulations must be changed if agencies with strong and scrupulous records of providing international adoption services are to continue to do so in the future. We do not believe that the Convention and the IAA either require or authorize the imposition of such extensive civil liability. The IAA sets forth the responsibilities and rule-making authority of the State Department. Congress did not grant the State Department the authority to create or alter the existing civil legal liability of adoption services providers. In fact, the IAA states explicitly that the law does not create a private right of action to seek administrative or judicial relief, except to the extent expressly provided in the Act. Moreover, we believe that, while seeking to protect prospective adoptive parents, the proposed regulations could have the opposite effect. The imposition of unprecedented litigation risks, particularly without any limits on the liability

imposed, would diminish the quality and availability of adoption services for children and families in the international adoption arena. We further believe that the goals of the Convention would be better served through a system of effective enforcement by the State Department, rather than through the imposition of unjustifiable legal liability risks on primary providers.

These and other comments are organized below by subpart – beginning with Subpart A and continuing through Subpart N.

III. Specific Comments on Proposed Regulation

Subpart A: General Provisions

We have a concern that the definition of "child welfare services" in section 96.2 may be overly broad in light of the fact that agencies and persons that provide only child welfare services are exempt from accreditation or approval requirements.

Proposed Language:
§96.2 Child Welfare Services means services exclusive of any service defined as an "adoption service" that is designed to promote and protect the well-being of a family or child.

Subpart B: Selection, Designation and Duties of Accrediting Entities

Accrediting entities will play a key role in ensuring the successful implementation of the Convention in the United States. The purpose of the Hague Convention and the Intercountry Adoption Act is to protect against abuses in international adoptions, to protect the interests of children, birthparents, and adoptive parents, and to improve the process of international adoption in the U.S. and abroad. To that end, it is essential to ensure a consistent accreditation process and the consistent application of standards by accrediting bodies.

Spence-Chapin supports, in concept, the proposal to allow public entities, including state licensing agencies, as well as not-for profit agencies to serve as accrediting bodies. However, our agency has several concerns not addressed in the proposed draft regulations:

First, we believe that there must be a mechanism to ensure consistent practices, consistent standards and consistent interpretations of the Convention, the IAA and the Hague regulations by accrediting entities – both across geographic regions, and with respect to applicants for accreditation and those seeking approved person status. We know from experience, for example, that public agencies in some states play a more active and involved role in oversight and licensing of adoption agencies than in other states. In some states, public

agencies uphold more vigorous standards than do agencies in other states. Without diligent efforts by the Department of State, these disparities are likely to carry over into the Hague accreditation process. It is exactly this type of inconsistency in standards for service providers that the Hague Convention sought to end. We believe, therefore, that the State Department must put a structure and appropriate training in place to monitor state agencies and not-for-profit organizations that serve as accrediting entities in order to achieve the necessary consistency in the implementation of the laws. The State Department should outline the standards and practices for accrediting entities through the regulation process and not simply in its agreements with accrediting entities.

Second, we believe that there must be a mechanism for the public to challenge the State Department's decision to designate or not designate a state or private entity as an accrediting body. Members of the public should also have the opportunity to file a complaint about an accrediting body, or to challenge the body's interpretation of a regulation or law. This is different from challenging an accrediting body's decision on an application for accreditation or approval.

Third, we believe that the accreditation application and processing fees charged by accrediting bodies must be consistent across geographic and jurisdictional boundaries. It would be unfair for fees to be higher in some parts of the country than in others.

These issues are significant, in part, because the proposed regulations indicate that the jurisdiction of accrediting bodies will be limited. Agencies, such as our own, may not be able to select from among several accrediting bodies to apply to for accreditation. If disparities among accrediting entities exist, agencies and persons in certain geographic areas, or otherwise in the jurisdiction of certain accrediting entities and not others, could be adversely affected.

Proposed Language:
§96.4(b) strike.
§96.4(c) strike. Replace with the following: The Secretary shall establish a procedure to obtain public input and comment on accrediting entities, or entities applying to serve as accrediting entities.
§96.8(a) The Secretary shall issue a schedule of fees for accreditation or approval services. An accrediting entity may only charge applicants fees for accreditation or approval services pursuant to this schedule.
(b) The schedule of fees will: (1) Establish separate non-refundable fees for Convention accreditation and Convention approval; (2) unchanged; and (3) Establish fees for temporary accreditation services.
(c) An accrediting entity must make the approved schedule of fees . . .
(d) Nothing in this section shall be construed to provide a private right of action to

challenge any fee set by the Secretary and charged by an accrediting entity.
§96.10(d): The Secretary will also establish a process for the public to file complaints regarding the policies and practices of approved accrediting entities. The Secretary shall not review individual accrediting entity decisions on accreditation through this complaint process.

Subpart C: Accreditation and Approval Requirements for the Provision of Adoption Services

The legal responsibilities and the liability risks imposed on primary providers in the proposed regulations are extremely troublesome. These concerns are discussed fully below in Subpart F.

Subpart D: Application Procedures for Accreditation and Approval

Spence-Chapin supports the transitional application process and the overall application procedures for accreditation and approval. We do, however, recommend three revisions to the proposed regulations.

First, we believe that the regulations should provide better direction to agencies or persons who obtain accreditation or approval after the transitional application process and once the Convention is entered into force in the United States. In particular, the regulations do not indicate at what point these agencies or persons are added to the list deposited with the Permanent Bureau of the Hague Conference on Private International Law, and at what point they can begin to provide Hague Convention adoption services. We believe that the State Department should regularly update the Permanent Bureau's list of accredited agencies and approved persons.

Second, we believe that section 96.20 should provide clearer guidance with respect to the length of time an accrediting entity has to evaluate an applicant for accreditation or approval. The term "timely fashion" is unnecessarily vague and open-ended.

Third, we disagree with the approach taken in section 96.21, limiting the geographic or other jurisdiction of accrediting agencies. We believe that applicants for accreditation and approval should be able to apply to any accrediting entity approved by the Department of State. This is the only way to ensure fairness and efficiency. If an accrediting entity is very slow, then applicants should, for example, have the freedom to seek accreditation elsewhere.

Proposed Language:
§96.18(d) The Secretary will deposit an updated list of accredited agencies and approved persons with the Permanent Bureau of the Hague Conference on Private International

Law every 3 months after the time the Convention enters into force.
§96.20(b) add: An accrediting entity must make a determination on a completed and properly filed application for accreditation or approval within 90 days.
§96.21(a) strike the following: "and that otherwise has jurisdiction over its application."
§96.21(b)(1) strike the following: "with jurisdiction over its application."

Subpart E: Evaluation of Applicants for Accreditation and Approval

We believe that the proposed system of assigning points to different standards in the accreditation process in section 96.27(d) should be better defined. There must be uniformity in the application of standards by different accrediting entities. Accrediting entities are likely to assign a different relevant weight to a particular standard. As a result, an agency or person could very easily obtain accreditation in certain jurisdictions and not in others. This patchwork of standards would undermine the goals of the Convention and the IAA. In fact, the IAA specifically requires that the Secretary "prescribe the standards and procedures to be used by accrediting entities for the accreditation of agencies and the approval of persons" through the promulgation of regulations. It is contrary to the law to leave this crucial matter to the discretion of each accrediting entity.

Proposed Language:
§96.27(d) strike and replace with the following: The Secretary will assign points to each different standard or to each element of a standard. The points system will be published for separate notice and comment.

Subpart F: Standards for Convention Accreditation and Approval

The Standards for Convention Accreditation and Approval are the central element of the proposed regulations. There are many ways in which the proposed regulations further the goals of the Convention and the IAA by ensuring that adoption practices will be principled and ethical. The regulations will go a long way towards improving the credibility and integrity of international adoptions. At the same time, there are a number of ways in which these proposed standards are simply untenable. We urge the Department of State to consider the following recommendations and make the following revisions to ensure the successful implementation of the Convention and the IAA.

Nation-wide accreditation: In section 96.30, we recommend that the regulations clearly state that once an agency or person is accredited or approved to provide Hague Convention adoption services, it is authorized to provide those services anywhere in the U.S. where it is otherwise licensed to operate.

Proposed Language:
§96.30(e) An accredited agency or approved person may provide Hague adoption services in any part of the United States that the agency or person is otherwise authorized by State law to provide adoption services.

Cash Reserves/Financial Resources: Section 96.33(e) requires that accredited or approved agencies or persons maintain a minimum of three months in cash reserves or other financial resources. We believe that this requirement is warranted and should not be changed. This requirement simply means that an agency or person must maintain a sound fiscal policy. Without the necessary cash reserves or other financial resources, agencies or persons are potentially vulnerable to those who engage in unscrupulous practices.

Liability Insurance: We believe that agencies or persons providing international adoption services should maintain insurance in the amount of $1,000,000 or more, as is proposed in section 96.33(h). Our own agency meets this requirement. We network with many other agencies, and we insist that agencies we work with carry adequate liability insurance. There are many cases in which aggrieved adoptive parents have received jury verdicts of hundreds of thousands of dollars in wrongful adoption and other claims against agencies. Again, it is sound fiscal policy to carry the level of insurance proposed in section 96.33(h). The proposed requirement is warranted and should not be changed.

At the same time, however, it is not acceptable to demand that accredited agencies or approved persons maintain insurance in the amount of $1 million per occurrence if the regulations impose new and significant litigation risks on these adoption service providers. The proposed regulations channel all liability to and impose new and unprecedented legal risks on primary providers. This new liability risk would make insurance prohibitively expensive. There is even a question as to whether insurance providers would even be willing to insure adoption services providers given these new risks. As discussed in more detail below, our agency believes that the IAA does not authorize the State Department to impose the new litigation risks on primary provider agencies and persons. We recommend that the proposed regulations be revised to excise these new legal risks imposed on primary provider agencies.

However, if the State Department determines that it has the authority and the policy justification to reform the current liability system in international adoptions, then it would be irresponsible to do so without imposing limits on that liability. Currently the proposed regulations invite litigation. There must be, at minimum, a threshold standard of proof that litigants must meet to recover damages in international adoption cases, a statute of limitations, a cap on damages, limitations on attorneys fees, and an overall recognition that prospective adoptive parents are assuming risks that are inherent to the process. Otherwise the principal consequence of these proposed regulations will be to open the floodgates for adoption-related

litigation. We do not believe, however, that the State Department can cure the existing defect in the liability provisions by limiting this primary provider liability. The IAA does not authorize the State Department to regulate agency or individual civil liability either to create it or to limit it. [4]

Compensation: Section 96.34 provides reasonable guidance to agencies like our own as to how to structure compensation in intercountry adoptions. It addresses a key provision in the Hague Convention, and one that the Secretary must strictly enforce to meet the goals of the Convention. This is an area, where our agency, like many others, will continue to seek guidance and feedback from the State Department in order to ensure our proper compliance with this important provision of the Hague, the IAA and the regulatory standards.

Suitability to provide Adoption Services: Section 96.35 of the proposed regulations legitimately requires disclosure of allegations or findings of inappropriate action by applicants for accreditation or approval. However, in our experience, it is possible for individuals to file unfounded complaints against an agency or person. We recommend, therefore, a change in the proposed regulations to ensure that unsubstantiated allegations do not adversely affect an agency or person's application for accreditation or approval. In particular, we recommend that section 96.35(5) be changed to require reporting of any founded written complaint(s) for the prior ten-year period.

> *Proposed Language*:
> §96.35(b)(5) For the prior ten-year period, any <u>founded</u> written complaint(s) against the agency or person, relating to the provision of adoption-related services, including the basis and disposition of such complaint(s) and the state, local or other authority that made the finding.

Professional Qualifications for Employees: Section 96.37 of the State Department's proposed regulations set appropriate criteria for employees practicing in the area of international adoption. Spence-Chapin hires only masters-level clinicians to prepare homestudies and to handle other similar social service functions. All of our supervisors have master degrees in social work or a related field. They also have significant clinical experience. We believe that this is essential. We urge the Department of State to retain these important professional requirements. They ensure that we set a high standard for adoption services so that practices both here and around the world improve with the implementation of the Hague Convention.

Spence-Chapin expects to devote substantial resources in Convention adoption cases to the review of homestudies prepared by exempt and supervised agencies or persons. This work will be made more difficult if the standards for professional qualifications are diluted.

At the same time, we believe that the regulations should guard against the possibility that agencies or persons will seek to create a "subsidiary" that simply conducts homestudies as an exempt organization in an effort to evade these professional requirements. The regulations should make clear that there can be no overlap in personnel, supervision, office space, or funding between exempt and non-exempt agencies or persons. The regulations must treat two overlapping entities as one agency or person, and require either accreditation or approval, or supervision by an accredited agency or approved person in order to provide adoption services under the Convention.

> *Proposed Language*:
> §96.37(h) A homestudy or child background study will be considered to have been completed by an accredited agency or approved person if the person who prepared the homestudy or child background study serves on the staff of, shares office space with, receives funding from, and/or works under the supervision of the accredited agency or approved person. This person or entity preparing a homestudy or child background study in a Convention adoption cannot be considered exempt under these regulations.

Prohibition Against Blanket Waiver of Liability: Section 96.39 (d) of the proposed regulations prohibits an agency or person from requiring a client or prospective client to sign a blanket waiver of liability in connection with the provision of adoption services in Convention cases. This requirement demands clarification.

International adoption is fraught with risks. Indeed, section 96.48 of the proposed regulations appropriately requires agencies or persons to provide education for clients and prospective clients on many aspects of international adoption, including the many risks involved. Many of the risks involve matters outside the control of any agency or person. The proposed prohibition against a blanket waiver could have the effect of transferring these inherent risks to the accredited adoption agency or approved person.

Certainly, any waiver that an individual is asked to sign should be an informed waiver, and must be appropriately tailored. No agency or person should ask a client or prospective client to waive any claim against the agency or person for acts of serious wrongdoing, negligence, fraud, or malfeasance. However, there is much in the area of international adoption that involves known risk – medical information that an agency receives is not always complete, the laws and policies of foreign countries can change suddenly, travel conditions can change, resulting in unanticipated delays. These factors are often well beyond the control of an adoption agency in the U.S. It is entirely appropriate for an agency to ask a client or prospective client to waive liability with respect to those known risks for which the agency should not and cannot be held responsible. If the proposed regulations intend to bar this type of waiver, then the future of international adoptions is in peril. A blanket waiver prohibition, particularly when taken in

conjunction with other provisions that raise the risk of liability against primary providers, would further threaten the viability of those agencies and persons likely to serve as primary providers in the U.S. If the State Department's proposed regulations allow for this type of waiver, then the language must be clarified accordingly.

> *Proposed Language*:
> §96.39(d) strike and replace with the following: The agency or person may require a client or prospective client to sign a waiver of liability provided the waiver is limited, specific, and based on risks that have been disclosed and explained to the client. The agency or person may not ask a client or prospective client to waive any claim against the agency or person for acts of serious wrong-doing, negligence, fraud, or malfeasance.

Fee Policies and Procedures: The proposed fee policies and procedures in section 96.40 should go a long way toward upgrading financial practices in international adoption. The concern that we have with these proposed regulations relates primarily to our commitment to work with adoptive parents of moderate means and to the difficulty that we face in calculating costs on a per-case basis.

Spence-Chapin is committed to helping a diverse group of families to adopt children domestically and internationally. We believe that there are many loving families that make wonderful homes for children, but that not all of these families have the level of financial resources often needed to pay the high cost of international adoption. Consequently, we offer a sliding fee scale to our clients and prospective clients. Very few adoptive parents actually pay fees that cover the cost of the adoption services that our agency provides. In fact, our international adoption fees support only 33 percent of our agency's costs for our international adoption services. On average, Spence-Chapin, subsidizes 67 percent of the cost of each international adoption. This is consistent with our mission as a charitable organization with 501(c)(3) authorization. The agency expenses exceed the fees paid in an international adoption in most of our clients' cases.

Additionally, it is impossible to predict precisely what an individual adoption will cost our agency. There are many different variables that vary family to family. These factors include the amount of time that our staff will devote to individual or group counseling for a particular family, the time that we will spend in meetings, preparing documents, conducting any necessary legal research, and to what extent our staff provides travel advice. As a result, it is difficult and costly to provide clients with the type of itemized expenses that the regulation requires.

At the same time, we believe it is important to be clear with prospective parents about how much it will cost them to proceed with an international adoption and how exactly that money will be spent. We believe it would be useful, therefore, to clarify that agencies must

provide prospective clients with a schedule of how fees paid by adoptive parents will be spent based on the average costs of an international adoption.

Proposed Language:
§96.40(b) Before providing any adoption service to prospective adoptive parent(s), the agency or person discloses in writing the following information for each category of fees and expenses that the prospective adoptive parent(s) will be charged in connection with a Convention adoption based on the average costs involved in an adoption from a particular Convention country.
§96.40(b)(1) through (7) retain reference to fees and delete reference to expenses.

Acting as a Primary Provider and Supervisor of Providers in the United States and Abroad: The proposed legal obligations and requirements imposed on a primary provider throughout the regulations would discourage many agencies from serving in that role.

The proposed regulations place an undue burden on primary provider agencies. Simply stated, the proposed regulations expose primary provider agencies to civil liability in an area that carries tremendous and identifiable risks. The State Department has, in developing a policy that imposes new, unprecedented, and unwarranted liability risks on primary providers, exceeded its authority under the Convention and the IAA. We believe that such a policy could only legitimately be instituted through an Act of Congress.

All adoption agencies face the risk of litigation today. Agencies face wrongful adoption suits, suits by adopted children over the agency placement, and a myriad of other actions. In most cases, if the agency has acted with reasonable care, for example, in educating the adoptive parents, conducting the homestudy, and disclosing all available medical information, then the agency will not be held liable. The courts have recognized that there are inherent risks involved in international adoption and the adoption agency cannot be held responsible in that unfortunate circumstance where the risks inherent in the process actually materialize.

The proposed regulations ignore this important legal rubric. Without any apparent legislative authority, the proposed regulations simultaneously seek to:

- Hold primary provider agencies responsible for the actions of supervised agencies in the U.S.;
- Transfer the risks in adoptions from adoptive parents to agencies and persons;
  Hold primary provider agencies responsible for the actions of supervised entities abroad – entities over which realistically U.S. agencies and persons exercise very little control or supervision;
- Create a cause of action for adoptive families against primary providers. The proposed

regulations expressly require that primary provider agencies retain legal authority in relationship with supervised providers and "Assume tort, contract and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contracted services and its compliance with the standards in this subpart F." The regulations further require the primary provider to maintain "a bond, escrow account or liability insurance in the amount sufficient to cover the risks of liability arising from its work with supervised providers. See §§ 96.45(b)(8), 96.45(9)(c), 96.45(b)(9) and 96.45(9)(c);

- Set no limits on liability, the standard of proof, damages, attorneys fees, or other relief that litigants can seek in suits against primary providers; and
- Offer the empty suggestion that primary providers seek protection through indemnification agreements with supervised providers.

These proposed measures would, if contained in final regulations, impose an unmanageable financial burden on the agencies and persons that serve as primary providers. They are completely unworkable and unrealistic. They should be deleted for the reasons enumerated below.

First, the provisions will not help prospective adoptive families and could put many legitimate supervised providers out of business. Many prospective adoptive parents work with small local agencies when hoping to adopt a child from abroad. These local agencies often do not handle international adoptions and will, in turn, network with agencies that run international adoption programs. These local agencies will not be likely to seek accreditation. The accredited agencies and persons are not likely, however, if the proposed regulations are finalized, to work with non-accredited or non-approved agencies or persons. The liability risks will be too high. Hence, the local agency will not be able to help the local family in its effort to adopt a child internationally. The local agency and the family suffer. Families will have fewer options in choosing a provider in international adoption, and there will be fewer families available for children in need of homes.

Second, the regulations provide a strong framework to ensure that primary providers fulfill their responsibilities under the new law through the agency accreditation process. There is no need to resort to new legal liabilities to ensure compliance. The agency's or person's accreditation or approval is contingent on appropriate supervision of supervised entities. Agencies serving as primary providers will take this responsibility seriously. If the threat of losing accreditation is not a strong enough tool to ensure primary provider vigilance in exercising its supervisory responsibilities, then the State Department should put a stronger enforcement mechanism in place. There are civil and criminal penalties in the IAA, and the Justice and State Department should use these penalties against those agencies or persons that engage in serious or repeated violations of the Hague Convention, the IAA, or the regulations.

Civil legal liability is not a substitute for enforcement by the Department of State.

Third, the proposed regulations impose an impossible requirement on primary providers with respect to oversight of and responsibility for supervising providers abroad. This is an unreasonable and unrealistic expectation with serious financial and legal consequences for primary providers. American agencies have little control over the day-to-day operations of counterparts in other countries. There are cultural and language barriers, as well as financial and legal barriers. International adoptions would be prohibitively expensive if primary providers had to set up an operation to provide the kind of supervision anticipated in these regulations. At the same time, given the limited resources of many agencies abroad, the chance of meaningful indemnification is probably non-existent.

Fourth, most agencies work diligently to ensure that their own employees act with reasonable care. This involves constant supervision, training and peer review activities. While it is possible to ensure that supervised agencies meet necessary standards, it is impossible to oversee a supervised agency's employees on a day-to-day basis, especially given the limited resources that not-for-profit agencies have. Our agency will work to ensure that agencies we supervise comply with the spirit and letter of the Convention, the IAA and the regulations. However, it would be unfair and unwise to impose civil liability on our agency for another agency's error that is outside of our agency's control.

Fifth, adoption agency insurance is already very costly, and that insurance covers only potential litigation based on the agency's own actions. Insurance companies currently examine the agency's record and make a decision about what level of risk is involved. If an insurance company is examining the risk of litigation faced by a primary provider and must factor in potential suits based on the actions of a supervised provider, the risk becomes unquantifiable.

Finally, when taken together, the new legal risks imposed on primary provider agencies by these proposed regulations are substantial and cannot be justified under the IAA. We believe that the Department of State is essentially legislating a change in liability laws as they affect international adoption. This policy is neither authorized by nor provided for in the Hague Convention or the IAA. We believe that only Congress has the authority to impose this substantial liability on primary providers and Congress did not do so.

If the State Department continues to assert that it has the authority through regulations to impose these legal risks on primary providers, then the Department should limit the liability through caps on damages, limits on attorneys fees, the imposition of a statute of limitation in Convention cases, and by developing a realistic standard of proof of agencies in Convention cases – recognizing the unpredictability and the high risk involved in these adoptions.

Proposed Language:
Strike §§96.45(b)(8) and (c) and 96.46(b)(9) and (c).

Provision of Medical and Social Information in Incoming Cases: Spence-Chapin makes every possible effort to provide prospective adoptive parents with the most comprehensive, timely and accurate medical and social information on children. The State Department, as reflected in the proposed regulations, recognizes that despite all of our best efforts, we cannot always succeed in obtaining the kinds of records that we expect and seek. We believe that the proposed regulations strike an appropriate balance between the need to strive towards the production of better records and the need to recognize the limitations that exist today.

Subpart I and J: Routine Oversight by Accrediting Entities and Subpart J: Oversight Through Review of Complaints

We believe that it is essential for accredited agencies, approved persons, adoptive families and others in the adoption system for the State Department to establish a workable system for the filing, investigation and resolution of complaints. When an agency or person and an adoptive family cannot resolve differences, an independent body must promptly review and resolve the matter. The agency deserves to have its record cleared quickly if there is no basis for a complaint. At the same time, if an agency or person is the subject of a number of founded complaints, that information should be made available to an accrediting body quickly, as well as to those responsible for civil and criminal enforcement under the IAA. The complaint process in the proposed regulations does not accomplish these goals.

Proposed Language:
§96.70(4) The Secretary will publish further regulations specifying the process for the timely investigation and resolution of complaints. Complainants as well as agencies and persons that are the subject of complaints shall have the opportunity to present evidence, to receive proper notice of pending complaints and proceedings. All complaints must be reviewed within 90 days. Unsubstantiated complaints must be dismissed within 120 days from the date filed.

Subparts K and L: Adverse Action by the Accrediting Entity and Oversight of Accredited Agencies and Approved Persons by the Secretary

Accrediting entities can impose a range of sanctions on accredited agencies or approved persons. It is essential, based on the principles of due process and the provisions of the IAA, that the State Department articulate through regulations how these sanctions will be imposed. The State Department should issue specific regulations specifying the circumstances that will

justify a cancellation of accreditation, a non-renewal, or an order to cease providing services. The regulations should further specify the procedures to be used by accrediting entities in making these determinations. The regulations as currently drafted could result in the uneven, unpredictable and subjective imposition of sanctions by accrediting bodies.

> *Proposed Language*:
> §96.75 In determining whether to take adverse action against an accredited agency or approved person, the accrediting entity must follow procedures and standards to be set by the Department of State in forthcoming regulations.

Subpart M: Dissemination and Reporting of Information by Accrediting Entities

The information maintained by accrediting entities should, as the proposed regulations require, be made available to the public. The information will tell the story of how the Hague Convention is working. The information is certain, also, to prove essential to adoption service providers and families in the U.S. who want to make an informed decision about where to go for adoption services.

Subpart N: Procedures and Standards Relating to Temporary Accreditation

Spence-Chapin believes that children and families will be best served if there are many different agencies available to provide intercountry adoption services. We believe the temporary accreditation program is an important vehicle to ensure that smaller agencies can offer these services with minimum administrative or financial burden.

IV. Conclusions and Recommendations

We recommend, given the extensive comments on the issues of liability accreditation and approval standards, and the role of primary providers, that the Department of State re-issue these proposed regulations in draft form before issuing final regulations. We recognize that there are many different kinds of agencies and adoption practitioners in the United States and that it will be impossible to achieve a consensus on many of the issues. In addition, we understand that what may be the best policy to implement the Convention and the IAA could be different from current practice and guaranteed to raise objections in parts of the adoption community. However, given the significance of the proposed regulatory matters, we urge you to allow for another round, albeit brief, of notice and comment as the revisions suggested in these and other comments are extensive.

Spence-Chapin is a member of JCICS and that organization has very ably addressed a broad range of issues with respect to the comments, and has expressed views with which our

agency, in large part, shares. However, we are filing separate comments to draw emphasis to a number of issues that affect agencies like our own – agencies that will often serve as a primary provider of adoption services. We urge you to consider the above comments carefully, as the outcome in the regulations will determine to what extent agencies like our own will, in the long run, continue to provide international adoption services and to find homes for children who desperately need them around the world.

Respectfully Submitted,

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